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### Right to Recover for Breach of Implied Warranties In Sales of Food

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the claiming of a return on property leased from a municipality require clear and convincing support as to their propriety in law.<sup>20</sup>

The application of the utility in *Prendergast v. New York Telephone Company*<sup>21</sup> is the antithesis of the *Interborough* case in the matter of sufficient facts upon which to grant summary relief. The only problem in that case was the determination of a fair valuation of the property used and useful in the operation of the utility, and the relationship of the prescribed rates to the fair value.

"The bill specifically alleged that the cost of the company's property in the State devoted to the rendition of intrastate telephone service, the cost of its reproduction and its fair and reasonable value \* \* \* and that the rates prescribed by the Commission would prevent it from earning more than 2.56% upon the cost of such property and 1.96% upon its fair and reasonable value, and would not afford it a fair return upon such value."<sup>22</sup>

If the allegations were substantiated by proof it is apparent that the prescribed rates were insufficient to yield a fair return on a fair valuation and that the petitioner was being deprived of property in violation of its constitutional rights.

The protection of constitutional rights is a grave responsibility of the federal courts. To justify summary relief, however, the invasion of the petitioner's rights must be clearly established by it. This requires cogent and convincing evidence, the effect of which, interpreted in the light of existing principles of the law, shows that the prescribed rates are insufficient in fact. The degree of success with which this burden is met measures the propriety of the exercise of judicial discretion in granting the temporary injunctive relief.

EDWIN P. WOLFE.

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#### RIGHT TO RECOVER FOR BREACH OF IMPLIED WARRANTIES IN SALES OF FOOD.

It is a well-settled principle in the law of sales that upon the sale of food for human consumption there arises an implied warranty that it is wholesome and fit for the use presumably intended. This was so

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<sup>20</sup> The failure adequately to support these contentions in the *Interborough* case contributed largely to the reversal by the Supreme Court of the order of the lower court.

<sup>21</sup> *Supra* Note 4.

<sup>22</sup> *Ibid.* 262 U. S. at 47, 43 Sup. Ct. Rep. at 468.

at common law<sup>1</sup> and is now provided for by statute in most jurisdictions.<sup>2</sup> The implication of wholesomeness and fitness for use according to an eminent authority on the subject, had its inception, in part at least, upon the language of an old statute.<sup>3</sup> But whatever the initial appearance may have been, the rule is now too well established to be contradicted.<sup>4</sup> However, it appears that the implied warranty runs only as between the contracting parties and not as to third persons, be they subpurchasers or donees.<sup>5</sup> Of course, even as to third persons an action *ex delicto* would sound if the articles were negligently or improperly manufactured.<sup>6</sup> The difficulty here lies in that recovery predicated upon a cause of action sounding in tort requires the plaintiff to allege and prove the negligence of the manufacturer or seller and not merely the introduction of the contract and breach thereof were the action *ex contractu*.<sup>7</sup>

Where a marital relationship exists "the husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them he is obliged to pay them; but for any-

<sup>1</sup> *Race v. Krum*, 222 N. Y. 410, 118 N. E. 853 (1918); *Maxwell v. Marsh*, 173 App. Div. 1003, 159 N. Y. Supp. 1128 (4th Dept., 1916) *aff'd* without opinion 225 N. Y. 637, 121 N. E. 878 (1918).

<sup>2</sup> Uniform Sales Act, Sec. 15 subd. 1; N. Y. Personal Property Law, Sec. 96 \* \* \* there is no implied warranty or condition as to the quality or fitness \* \* \* except as follows: 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required \* \* \*.

Although the statute is framed in negative fashion the mere bid to purchase food from a dealer makes known the particular purpose, thus it is that the statutory enactment merely reiterates the common law.

<sup>3</sup> Williston, *Sales* (2d ed. 1924) Sec. 241. The English courts early recognized an ancient penal statute and followed it to a natural conclusion by granting civil relief for injuries sustained by reason of sales of unwholesome food.

<sup>4</sup> *Supra* Note 2.

<sup>5</sup> In *Chysky v. Drake Brothers Co.*, 235 N. Y. 468, 139 N. E. 576, 27 A. L. R. 1533 (1923), *McLaughlin, J.*, declared: "If there were an implied warranty which inured to the benefit of plaintiff it must be because there was some contractual relation between her and the defendant and there was no such contract. \* \* \* The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty who have no contractual relations with him."

<sup>6</sup> A manufacturer of drugs is liable for preparing belladonna, a poisonous drug and falsely labeling it dandelion, *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (1849); a manufacturer of a defective coffee urn, *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 88 N. E. 1063 (1909); a dealer in the sale of an automobile possessing a defectively constructed wheel, *MacPherson v. Buick Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916) and authorities cited therein.

<sup>7</sup> In *Gearing v. Berkson*, 223 Mass. 257, 111 N. E. 785 (1916) an action was commenced by husband and wife against a dealer in pork chops. The chops were unwholesome and unfit for human consumption and both plaintiffs were rendered ill as a result. The Court granted recovery to the husband for injuries sustained but denied it to the wife first because she was not in privity of contract with the defendant dealer, being merely the agent of the husband and, secondly, because she could not, in fact, prove the negligence of defendant though the Court found that the food was adulterated, in violation of a statute and that presumably there was some evidence of negligence.

thing besides necessities he is not chargeable." <sup>8</sup> What constitutes articles of necessity depends upon the facts and circumstances in the particular case and the authorities are not in accord as to what the term includes, the older authorities placing an arbitrary limitation by schedule,<sup>9</sup> while the modern include any article necessary to the reasonable support and maintenance of the wife.<sup>10</sup> Provisions for human consumption are among the articles of necessity which the husband is bound to provide.<sup>11</sup>

What application has been made of the general principles thus stated is well illustrated in recently reported decisions in this state.<sup>12</sup> In *Vaccaro v. Prudential Condensed Milk Co.*,<sup>13</sup> milk purchased by the plaintiff from the defendant which was unfit for human consumption rendered plaintiff ill. An action was commenced found on contract for breach of implied warranty for damages resulting from the illness. On the trial the complaint was dismissed. The Court held that no warranty ran to the plaintiff inasmuch as she failed to prove that she purchased the food with her own money and that in the absence of such proof a presumption existed that the husband was carrying out his moral and legal obligation to support his wife; that therefore the wife was acting as agent for the husband and was not in privity of contract with defendant. The Court did not consider whether or not the plaintiff purchased the milk without knowledge on the part of the defendant, that plaintiff was married, or that her husband was responsible for the purchase. If this had been tested plaintiff might have recovered on the theory of undisclosed principal.<sup>14</sup>

In *Meyer v. Kerschbaum*,<sup>15</sup> plaintiff purchased of defendant (who conducted a bakery store) some sugar buns. She returned home and later while in the course of eating one of the buns was injured

<sup>8</sup> 1 Bl. Comm. \*442.

<sup>9</sup> *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17 (1873); *Sauter v. Scrutchfield*, 28 Mo. App. 150, 157 (1887); *Reed v. Crissey*, 63 Mo. App. 184, 191 (1895); *Thorpe v. Shapleigh*, 67 Me. 238 (1877); *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175 (1870). The Courts seemed content merely to reaffirm earlier decisions of their own courts even though it must have been apparent that a change was necessary. See 2 Kent Comm. 146.

<sup>10</sup> *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532 (1882) (the Massachusetts court refused to be bound by the old inflexible rule); *Bergh v. Warner*, 47 Minn. 250, 28 Am. St. Rep. 362 (1891); *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (NS) 508 (1911). The husband's obligation is to be measured with reference to his pecuniary ability or his pecuniary resources. What might properly be deemed necessities in a family of one with generous income might not be deemed so in the family of a man whose earnings were menial and who had saved nothing. See also *Schouler, Husband and Wife* (1882), Sec. 101 *et seq.*

<sup>11</sup> *Supra* Notes 9 and 10.

<sup>12</sup> *Vaccaro v. Prudential Condensed Milk Co.*, 133 Misc. Rep. 556, 232 N. Y. Supp. 299 (1927); *Meyer v. Kerschbaum*, 133 Misc. 330, 232 N. Y. Supp. 301 (1928).

<sup>13</sup> *Supra* Note 12.

<sup>14</sup> *Argersinger v. MacNaughton*, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687 (1889). See (1928) 28 Col. L. Rev. 110.

<sup>15</sup> *Supra* Note 12.

by biting on a carpet tack concealed therein. An action was instituted, predicated on contract theory for breach of implied warranty and, on the trial, the complaint was dismissed. On appeal, the appellate court reversed the decision of the lower court and supplemented the decision in the Vaccaro case by declaring that in the instant case plaintiff was the purchaser of the injurious article of food, that in so doing she was acting as agent for an undisclosed principal and, consequently, the contract ran to her and privity was thereby established. That the practical justice of a rule which would allow the wife a recovery, was in the mind of the Court, is fairly inferred from the fact that it established its conclusion on something more stable than "a presumption that the husband was carrying out his moral and legal obligation." What the Court decided might have successfully disposed of that particular proposition. But there remains the administration of the practical justice of a rule which will allow recovery in those cases where the doctrine of undisclosed principal is not applicable to the facts. The solution no doubt lies in the application of a new theory or theories based on the fusion of logic, justice and economic and social utility.<sup>16</sup>

The doctrine of beneficiary contracts has enjoyed a long and determined standing in this jurisdiction.<sup>17</sup> Indelibly imprinted on the judicial horizon by the decision of *Lawrence v. Fox*,<sup>18</sup> it has continued in growth and now requires due application when the general rules of contracts are under consideration.<sup>19</sup> While not yet nearly

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<sup>16</sup> Cardozo, *Growth of the Law* (1927), p. 143: "The victory is not for the partisans of an inflexible logic nor yet for the levelers of all rule and all precedent, but the victory is for those who shall know how to fuse these two tendencies together in adaptation to an end as yet imperfectly discerned."

<sup>17</sup> *Schermerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am. Dec. 304 (N. Y. 1806); *Weston v. Barker*, 12 Johns. 276, 7 Am. Dec. 304 (N. Y. 1815); *Delaware and H. Canal Co. v. Westchester County Bank*, 4 Denio 7 (N. Y. 1847); Corbin, *Third Parties as Beneficiaries of Contractors' Surety Bonds* (1928) 38 Yale L. J. 1, at p. 2 Professor Corbin states the general proposition that two contracting parties have power to create rights in a third party and that this has long been a general rule and not an *exception* in the law of contracts.

<sup>18</sup> 20 N. Y. 268 (1859).

<sup>19</sup> *Lawrence v. Fox*, *supra* Note 18; *Garnsey v. Rogers*, 47 N. Y. 233 (1872); *Vrooman v. Turner*, 67 N. Y. 280 (1877); *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20 (1884); *Gifford v. Corrigan*, 117 N. Y. 25, 22 N. E. 756 (1889); *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. 917 (1890); *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49 (1892); *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731 (1894); *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724 (1899); *Bouton v. Welch*, 170 N. Y. 554, 63 N. E. 539 (1902); *Matter of Kidd*, 188 N. Y. 274, 80 N. E. 924 (1907); *DiCicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918 E. 1004 (1917); *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187 (1918); Williston, *Contracts for the Benefit of Third Persons*, (1902) 15 Harv. L. Rev. 767; Corbin, *Contracts for the Benefit of Third Persons*, (1918) 27 Yale L. J. 1008; N. Y. L. J., May 3, 1927. Cf. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 33 Sup. Ct. Rep. 32 (1912); *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 48 Sup. Ct. Rep. 134 (1927).

defined it has been confined to four classes.<sup>20</sup> Contracts entered into for the benefit of the wife or other close relation constitutes the second group.<sup>21</sup> Applying, then, this principle to contracts entered into between the wife, as agent for the husband,<sup>22</sup> for the purchase of food, it is difficult to see why the application of such a theory should be denied or neglected. Certain it is that the wife will receive the benefits of the contract if it is faithfully performed, and there is no reason why, if it is breached and she suffers damages, restitution should not be in order.<sup>23</sup> Such a contract would bring her within the general rule that a wife may have a cause of action against a third party for breach of contract entered into between the husband and a third person for her benefit. It matters not that it is the wife that enters into the transaction as agent for the husband. She might not play a part in the negotiations, yet this would not vary the rule sought to be effected. The extension of the principle to other contracts besides those for the purchase of food might be prophesied. Courts are prone to extend liberal doctrines where necessity and common sense are determining factors. It may be that a liberal extension would not be effected. The theory does not thereby cease to exist. Logic and utility still struggle for the mastery.<sup>24</sup> Let us fuse them that the end sought may be sighted without undue haste nor yet lumbering hesitancy.

ALLEN K. BERGMAN.

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<sup>20</sup> *Seaver v. Ransom*, *supra* Note 19 at 237, 238, 120 N. E. at 640, 641. "*\* \* \* first, to cases where there is a pecuniary obligation running from the promisee to the beneficiary \* \* \* secondly, to cases where the contract is made for the benefit of the wife, \* \* \* affianced wife \* \* \*, or child \* \* \* thirdly, the public contract cases, \* \* \* and fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration.*" Attention is particularly devoted to the second class. (Italics ours.)

<sup>21</sup> *Todd v. Weber*; *Buchanan v. Tilden*; *Bouton v. Welch*; *Matter of Kidd*; *DiCicco v. Schweizer*; all *supra* Note 19; *Seaver v. Ransom*, *supra* Notes 19, 20.

<sup>22</sup> It is recognized that the agency is not generally a true agency founded on a contractual relationship but rather one implied by law, yet the courts speak of it as an agency and give to it the same effect as one established by voluntary agreement of the parties. *DeBrauwere v. DeBrauwere*, *supra* Note 10; see *Wanamaker v. Weaver*, 176 N. Y. 75, 68 N. E. 135 (1903).

<sup>23</sup> In *Buchanan v. Tilden*, *supra* Note 19, Gray, J., in the dissenting opinion declared that if in the case before him some legal obligation was being performed by the husband for the benefit of the wife he might grant a recovery for the wife against the third party with whom she was not in privity, but for the fulfillment of a moral or natural obligation no recovery could be upheld. In the subject under consideration a legal obligation does exist.

<sup>24</sup> *Cardozo, op. cit. supra* Note 16 at 78.